A

WOLFGANG LEONHARD SCHULZ & ORS v. SAPURA-SCHULZ HYDROFORMING SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN JC
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-27-06-2018]
B 30 OCTOBER 2018

ARBITRATION: *Award – Registration – Application to set aside registration of final award handed down by arbitral tribunal – Respondents failed, refused and/or neglected to comply with final award and have not paid damages ordered in final award – Whether final award could be registered as judgment prior to taxation of costs – Whether possible to take out and maintain action to recover costs where such costs had yet to be determined – Arbitration Act 2005, s. 39(1)*

A dispute between the applicants and the respondents led to two arbitrations, which were consolidated, at the Singapore International Arbitration Centre ('SIAC'). The arbitrator handed down the final award where the respondents were ordered to pay the applicants damages and legal costs ('the final award'). The applicants then demanded for the sums awarded under the final award but the respondents stated that they did not agree to the costs proposed *in lieu* of taxation and asked to have the costs taxed by the SIAC. No mention was made of the damages awarded to the applicants under the final award. Again, the applicants demanded for the payment of the damages but this was met with no response. To date, the respondents failed, refused and/or neglected to comply with the final award and have not paid the damages ordered. The court granted an order that (i) the applicants be given the permission to register and enforce the final award; and (ii) the legal costs awarded to the applicants under the final award be included as part of the enforcement order upon the final determination of assessment of the legal costs which was pending before the Registrar of the SIAC at the date of the application ('prayer 5') ('the order'). The order was served on the respondents. Hence, the present application by the respondents to set aside the order or, alternatively, para. 5. In support of the application, the respondents argued that (i) the final award had not yet become binding as taxation of the legal costs awarded to the applicants under the final award had yet to be concluded as at the date of filing of originating summons seeking for registration of the final award; and (ii) the originating summons and the order were contrary to public policy.

Held (dismissing application with costs):

(1) Section 39(1) of the Arbitration Act 2005 ('the Act') provides that, *inter alia*, recognition or enforcement of an award, irrespective of the state in which it was made, may be refused only at the request of the party against whom it was invoked where that party provides to the High

Court proof that the award has not become binding on the parties or if the High Court finds that the award is in conflict with the public policy of Malaysia. The respondents have to fall within one of the grounds of s. 39 of the Act in order to set aside the registration of the final award. (para 14)

(2) Since the liability to pay costs is separate from the issue of quantum and the right to costs emanated from a judgment or award and not the taxing officer's certificate, the respondents have not made out their case that the award has not yet become binding. (para 37)

(3) Case laws show that it is possible to even take out and maintain an action to recover costs where such costs had yet to be determined as at the date of filing of the action to recover them by the party entitled to such costs. None of the cases relied upon by the respondents tend to show that the final award could not be registered as a judgment prior to the taxation of costs. Even though costs awarded by an arbitral tribunal have not been taxed or agreed upon, they are to be included in the application for recognition/enforcement under s. 38 of the Act. (paras 30 & 60)

Case(s) referred to:

Charles Priya Marie v. Koshy Cherian [2010] 6 CLJ 693 HC ***(refd)***
Citibank NA v. Kung King-Heep Raymond [2011] 1 LNS 283 HC ***(refd)***
Diag Human SE v. Czech Republic [2014] EWHC 1639 ***(dist)***
Holdsworth v. Wilson [1863] 7 LR 434 ***(refd)***
Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co KG (Germany) & Anor [2018] 1 LNS 814 CA ***(refd)***
Lewis v. Rossiter [1875] 23 WE 832 ***(refd)***
Manchester, Sheffield and Lincolnshire Railway Co v. Guardians of the Poor of Doncaster Union [1896] 1 QB 117 ***(refd)***
Metropolitan District Railway Co v. Sharpe [1880] 5 App Cas 425 ***(refd)***
PCM Global Enterprise Sdn Bhd v. Vistaner (M) Sdn Bhd [2011] 1 LNS 1076 HC ***(refd)***
Relais Nordik Inc v. Secunda Marine Services Limited and Anor [1990] FCJ No 349 ***(dist)***
Rizana Mohamad Daud v. Naluri Corporation Bhd [2013] 1 CLJ 291 HC ***(refd)***
Santong Trading Pte Ltd v. Hj Industries Sdn Bhd [1996] 3 CLJ 954 HC ***(refd)***
Teo Yung Phiow @ Chang Sze Ming v. Maltimor Sdn Bhd [2006] 1 LNS 309 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2, 38, 39(1)

For the applicants - Puteri Shehnaz Majid & Aizurra Mirsya Aminudin; M/s Cheah Teh & Su
For the respondents - Kuhendran Thanapalasingam, Farah Shuhadah Razali & Ryan Wong; M/s Zul Rafique & Partners

Reported by Najib Tamby

A

JUDGMENT

Wong Chee Lin JC:

[1] This is an application by the respondents to set aside the registration of the final award handed down by the arbitral tribunal on 31 July 2012 and registered in the Singapore International Arbitration Centre ("SIAC") Registry of Awards as Award No. 68 of 2012 as a judgment or order of the High Court of Malaya and part thereof. I have dismissed the application. These are the full reasons for my decision.

Salient Background Facts

[2] A dispute arose between the applicants and the respondents which led to two arbitrations being initiated in the SIAC.

[3] The arbitrations were held in Singapore under the purview of the SIAC. The sole arbitrator who presided over the arbitrations was Mr Vinodh Coomaraswamy SC.

[4] Both arbitrations were consolidated by agreement of parties and heard together.

[5] On 31 July 2012, the arbitrator handed down the final award which was registered in the SIAC Registry of Awards on 1 August 2012 as Award No. 68 of 2012. Pursuant to the final award, the respondents were ordered to pay the applicants damages and legal costs.

[6] On 12 December 2014, the applicants' solicitors wrote to the respondents' solicitors and demanded the sums awarded under the final award as well as legal cost.

[7] On 18 December 2014, the respondents' solicitors wrote to the applicants' solicitors stating that the respondents were not agreeable to the costs proposed *in lieu* of taxation and asked to have the costs taxed by SIAC. No mention was made of the damages awarded to the applicants under the final award.

[8] On 23 December 2014, the applicants' solicitors wrote to the respondents' solicitors and asked about the payment of the damages awarded.

[9] There was no response to the applicants' solicitors' letter dated 23 December 2014.

[10] To-date, the respondents have failed, refused and/or neglected to comply with the final award. They have not even paid the damages that were ordered to the applicants. As regards costs, since the parties were unable to come to an agreement, the applicants' costs were in the process of being taxed at the time the application for registration of the final award was filed before me.

[11] On 10 July 2018, I granted an order that the applicants be given permission to register and enforce the final award and in prayer 5, that the legal costs awarded to the applicants under the final award be included as part of the enforcement order upon the final determination of assessment of the legal costs which was pending before the Registrar of the SIAC as at the date of the application. A B

[12] The said order was served on the respondents and the respondents have applied to set aside the said order dated 10 July 2018 or, alternatively, para. 5 in relation to the order for costs.

[13] The grounds put forward by the respondents are firstly, that the final award had not yet become binding as taxation of the legal costs awarded to the applicants under the award had yet to be concluded as at the date of filing of the originating summons seeking for registration of the final award, and secondly, that the originating summons was contrary to public policy and/or that the order dated 10 July 2018 ("the recognition/enforcement order") was contrary to public policy. C D

[14] Although the respondents did not make reference to s. 39 of the Arbitration Act 2005 ("the Act") it is not disputed that they have to fall within one of the grounds of s. 39 in order to set aside the registration of the award. Section 39(1) provides *inter alia* that recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked where that party provides to the High Court proof that the award has not become binding on the parties or if the High Court finds that the award is in conflict with the public policy of Malaysia. E F

[15] In support of their contention that the award had yet to become binding because the amount of costs had yet to be determined at the date of the application for registration, the respondents relied on two cases.

[16] The first case is *Diag Human SE v. Czech Republic* [2014] EWHC 1639. The brief facts of that case were that Diag, by agreement, commenced arbitration proceedings against Czech Republic. The agreement provided for an additional arbitral review process upon receipt of award. It was common ground that the review process was in the nature of 'ordinary recourse' and that the award would not become binding until the review process was determined. Diag sought to enforce the award before the review process was completed. Diag alleged that Czech Republic's request for review of the award was sent without proper authority and ineffective to trigger the review process. It was held that the review was properly triggered by Czech Republic and thus the award was subject to 'ordinary recourse' and was not binding. G H I

[17] It should be noted that in that case, the award was subject to a further review process which is akin to an appeal against the whole substantive award, as agreed by the parties. It was this further review process that was contained in the arbitration agreement that rendered the award subject to 'ordinary recourse'.

[18] The award in the present case was not subject to any review. What had yet to be determined was merely the quantum of costs. However, this did not render the award in this case not final or binding.

[19] The applicants' right or entitlement to costs arose from the arbitral award itself and not from the taxation which were merely proceedings to determine quantum.

[20] The House of Lords in *Metropolitan District Railway Co v. Sharpe* [1880] 5 App Cas 425 held that the right to costs was entirely independent of the taxation of them, and an action could even be maintained to recover the costs even though the amount of such costs had not been previously settled or ascertained by taxation. Per The Lord Chancellor (Lord Selborne):

> The costs are not created by taxation, nor is the legal right to recover them created by taxation. The right to recover them is given by the statute, the costs have been actually incurred, and in other cases of costs which are subject to taxation it is not generally a condition precedent of a demand, or of an action brought upon a demand for costs, that the costs should have been taxed. 'Settlement' or taxation is merely a mode of determining in a *quasi*-judicial manner, by a ministerial officer of the Court, disputed questions of amount when they arise. The action is founded upon the right; and a demand of that which the party considers himself entitled to have been made. In the action the first question to be determined is, has he the right which he claims or not? If he has, it is possible that there may be no question as to the amount; in that case there will be no need of taxation. But if a question of amount still remains to be determined, the machinery of taxation is convenient; and it is prescribed by the statutes, as subsidiary for the purpose of justice, but not as the foundation of the right. That seems to me to be the principle of the decision in the case of *Holdsworth v. Wilson* ....

[21] Per Lord Hatherly in *Metropolitan District Railway Co v. Sharpe*, on the question of whether or not any right of action can be maintained by a party (to recover costs owing) until such costs in respect of which the party is about to bring his action have been definitely settled:

> My Lords, I think the observations made in one of the cases cited before us, really have a strong application to that part of the case. If a person is entitled to costs, it is implied that they are to be taxed costs. The principle of taxing costs is well understood, and I do not think that the circumstance that if a reference is made to the Taxing Master, and he is persona designate, I do not think that can make any substantial difference

> in the case. He must proceed on definite and fixed rules, not as investigating the facts with a dubious result in law attached to those facts, but simply as taxing the bill in the ordinary way in which he acts, when any gentleman who wishes to dispute a bill brought against him by his own solicitor, has a right to have it taxed. If it is decided that that gentleman is bound to pay the solicitors' bill of another person for some litigation which he has entered into, when that is settled and he is once fixed with the liability to pay the bill incurred by another person, or whatever it may be, you have settled everything requiring to be settled judicially. The rest follows as a matter of course upon definite and fixed principles; and it has been well described by one of the learned Judges in one of the cases that were cited, as a "ministerial" act and not a judicial act which remains to be done. The judicial act was deciding upon the question of principle, and ascertaining whether the gentleman was liable to pay the costs at all. The case of *Holdsworth v. Wilson* (1) has been cited upon this point. I am extremely glad to find that there is such an authority, and I am extremely glad to follow it, and I think it carries the case now before the House.

[22] The House of Lords in *Metropolitan District Railway Co v. Sharpe* endorsed the cases of *Holdsworth v. Wilson* [1863] 7 LR 434 and *Lewis v. Rossiter* [1875] 23 WE 832.

[23] In *Holdsworth v. Wilson*, in particular, the court held that an award for costs generally, without ascertaining the amount, was valid and the party to receive, after delivering his bill for the amount, may maintain an action to recover them.

[24] The paying party may have the costs taxed, but taxation is not a condition precedent to the other party's right to bring an action to recover them.

[25] The court held the award for costs to be valid notwithstanding that quantum had yet to be taxed at the time the action to recover such costs on this ground: an award for costs means the judicial costs of the litigation, and that the costs are to be ascertained "ministerially" by the proper officer, who is to have authority to settle the amount.

[26] The plaintiff in that case sent in the amount of costs and brought an action to recover them as a liquidated sum, which they are, in the sense that they can be settled at any time by going before the taxing officer for that purpose. "The taxation is for the benefit of the party by whom the costs are to be paid, and it is not a condition precedent to the action being brought to recover them".

[27] In the English Court of Appeal case of *Manchester, Sheffield and Lincolnshire Railway Co v. Guardians of the Poor of Doncaster Union* [1896] 1 QB 117, it was ordered by the Court of Appeal that the defendants should pay to the plaintiffs the costs of the appeal. The judgment was given in July 1893. The costs were not taken in for taxation for a considerable time, and the taxing master's allocator was not given until December 1895. The defendants having declined to pay, an action was brought by the plaintiffs shortly after the date of the allocator to recover the amount of the taxed costs.

[28] The defendants had argued that the time within which they can legally pay the costs is to be reckoned from the date of the judgment that the time limited by the statute had elapsed before the action was brought to recover those costs, and that therefore, they are not bound to pay them.

[29] The Master of the Rolls, Lord Esher, observed that a judgment for costs enables the party in whose favour it is given to say that they are due, and to maintain an action for them, so that the right to costs arises on the judgment of the court, though at that time they are not taxed.

[30] The above cases show that it is possible to even take out and maintain an action to recover costs where such costs had yet to be determined as at the date of filing of the action to recover them by the party entitled to such costs.

[31] The learned author Sundra Rajoo in his textbook *Law, Practice and Procedure of Arbitration* cited the cases of *Metropolitan District Railway Co v. Sharpe, Holdsworth v. Wilson and Lewis v. Rossiter* as authority for the proposition that "even though costs awarded by an arbitral tribunal have not been taxed or agreed upon, they are to be included in the application for recognition/enforcement under s. 38".

[32] According, I am of the view that the *Diag Human* case relied on by the respondents is distinguishable.

[33] In the other case relied upon by the respondents to say the award has not become binding, that of *Relais Nordik Inc v. Secunda Marine Services Limited and Anor* [1990] FCJ No. 349 the parties submitted their dispute to arbitration where an award was given. The defendant then applied to the arbitral tribunal under the Canadian equivalent of the Arbitration Act for correction of the award pertaining to an error in the computation of interest. The parties agreed that there was an error in the computation. The arbitral tribunal had not yet submitted its decision and made an additional award in accordance with the defendant's request for correction. The plaintiff had applied to the court to register the award before the defendant's application for correction was decided.

[34] It was held that given that the defendant had exercised its right to request a correction of the award and the tribunal had not yet decided that request, the plaintiff's application to register the award was dismissed. The arbitral tribunal was still seized of the matter ie the tribunal still had jurisdiction over the request for correction.

[35] This case is also distinguishable because the substantive award had yet to be finalised and the arbitral tribunal still had jurisdiction over the matter whereas in this case, no part of the final award is being impugned by the respondents who had already exercised all their rights in respect of the final award in attempting to impugn the award.

[36] In the *"Law of Costs"* by G E Dal Pont, it is stated as follows:

> As such, the power of a taxing officer to issue a certificate of taxation is a *quasi*-judicial power, and not purely ministerial in character. It is not a wholly judicial function, as the certificate constitutes neither a final judgment or order nor an order for payment of sum of money. In each case liability depends on an existing separate order for costs by a court or tribunal or, in some jurisdictions, the agreement that costs payable by one party to another party may be taxed.

[37] Since the liability to pay costs is separate from the issue of quantum and the right to costs emanates from a judgment or award and not the taxing officer's certificate, I find that the respondents have not made out their case that the award has not yet become binding.

[38] For the sake of completeness, I shall also deal with some cases decided under the Reciprocal Enforcement of Judgments Act 1958 ("REJA") relied upon by the respondents. In this respect, I would refer to the Court of Appeal decision in *Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co KG (Germany) & Anor* [2018] 1 LNS 814. This was a case where the appellant had applied to register the whole of the arbitral award under s. 38 of our Arbitration Act 2005. The respondent objected to the registration application as it only wanted a part of the award to be registered, and not the whole of the award because the award contained damning findings against the respondent. The respondent's challenge was on the basis that only the dispositive portion of the award (ie the tribunal's actual conclusions) was capable of being registered as a judgment of the High Court.

[39] The High Court agreed with the respondent that only the dispositive portion of the award was capable of being recognised as binding and enforceable as a judgment of the High Court. The learned JC construed the term "award in s. 2 of the Arbitration Act by finding that it only refers to the "dispositive part" of an award and not the whole award".

[40] The Court of Appeal held that the learned JC's reliance on REJA was plainly wrong. Harmindar Singh Dhaliwal JCA said this:

> [40] REJA only applies to foreign judgments not arbitration awards. We note that the definition of "judgment" in s. 2 of REJA includes "an award in proceedings in arbitration if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place". It is our impression, therefore, that REJA does not deal with arbitration as submitted. It applies to awards which have become enforceable in a foreign country as a judgment of the court, usually after registration in accordance with the laws of that foreign country".
>
> [41] We also do not think that ss. 3 and 4 of REJA, upon which much reliance was placed by the learned JC, provide any assistance as those provisions apply only to judgments given in the superior courts of reciprocating countries. It would have been more appropriate to rely on the provisions of AA 2005 which is not only recent legislation but specifically created to govern all matters relating to arbitration in Malaysia.

[41] In any event, a consideration of the facts and findings of the cases relied upon by the respondent as set out below will show that they are totally irrelevant and inapplicable to the present case.

[42] *Santong Trading Pte Ltd v. Hj Industries Sdn Bhd* [1996] 3 CLJ 954 was a case concerning a foreign judgment. The plaintiff sued the defendant for breach of contract in Singapore where the defendant had admitted a substantial part of the claim. The Singapore court entered judgment for that sum and gave the defendant unconditional leave to defend the balance claim. Nonetheless, the plaintiff proceeded to register that judgment in Malaysia under the REJA. It was held that the judgment was not final as the defendant had been given unconditional leave to defend the balance sum and the defendant's total liability to pay damages had yet to be fixed for hearing.

[43] In *Charles Priya Marie v. Koshy a/l Cherian* [2010] 6 CLJ 693; [2010] AMEJ 0168 the Malaysian court had granted an order pursuant to the REJA to register a Singapore judgment concerning divorce proceedings. The judgment-debtor applied to set aside the order and the issue was whether the foreign judgment was final and conclusive. It was undisputed that the Singapore judgment gave the parties liberty to apply should there be any material change in the circumstances pertaining to the matrimonial proceedings. It was held that since the Singapore judgment provided that there been liberty to apply to vary the orders granted, the judgment was not final and conclusive within the meaning of the REJA.

[44] In *Citibank NA v. Kung King-Heep Raymond* [2011] 1 LNS 283, the defendant had applied to set aside the registration of a Singapore judgment, the order for registration of the Singapore judgment as well as the notice of registration of foreign judgment.

[45] The defendant argued that the court order and registration notice should be set aside because the Singapore judgment was null and void. The defendant submitted that the Singapore judgment was not final and conclusive and hence not recognised under the REJA due to the indeterminate interest sum in the Singapore judgment.

[46] The defendant further submitted that the judgment was still uncertain and open to abuse by the plaintiff due to indeterminate interest sum, which is no different from a judgment for an unspecified sum.

[47] The plaintiff argued that the interest calculation was not a ground to set aside the registration and that the Singapore judgment was registrable as the cost of funds related to the interest was not a static element and fluctuates over time. Hence interest may only be calculated on the date of full payment of the Singapore judgment sum.

[48] It was held that the Singapore judgment was final and conclusive under the REJA.

[49] The second ground relied upon by the respondents is based on public policy. It is essentially based on the fact that the applicants have six years from the date of issuance of the award to register the award. That is not in dispute. The respondents' grievance is that the application was registration was made within the six years, but before the costs have been taxed. The costs have since been taxed but the Registrar's Certificate was issued after the expiry of the six years.

[50] The applicants' answer is simply this. The ground relied upon by the respondents can only be that the award is contrary to public policy whereas that is not the ground relied on by the respondents. The respondents said that the originating summons was against public policy or that the enforcement order granted by the court was against public policy. I am of the view that the respondents have not shown that the award itself was contrary to public policy and so they do not fall within the wording of the relevant provision in s. 39 of the Act to be able to set aside the registration of the award.

[51] I am of the view that once the facts of the cases relied upon by the respondents are considered, it will be seen that they are inapplicable and do not further their argument on limitation in any way.

[52] In *Teo Yung Phiow @ Chang Sze Ming (trading as a partner under the style and firm name of Kion Ming Construction Co) v. Maltimor Sdn Bhd* [2006] 1 LNS 309; [2006] AMEJ 0069, the defendant had appointed the plaintiff as a sub-contractor for four projects. The plaintiff sued the defendant for failure to pay monies in respect of those projects. The defendant disputed that it owed the plaintiff and alleged that the plaintiff's claim under each of the projects was time-barred. At trial, the plaintiff admitted that he could have

A sued the defendant upon the defendant's failure to pay the monies due but that he "did not want to" because he did not know at the material time that he had a right to sue or that there was a time limit to sue. The plaintiff further alleged that time only began to run from the time he knew of his right to sue (ie when he realised the defendant was avoiding payment).

B **[53]** It was held that the plaintiff's explanation that he did not know he had a right to sue was immaterial because even if true, it does not detract from the fact that the plaintiff could have sued but did not want to.

[54] It was held that the time began to run from the date of breach, ie the defendant's failure to pay for the respective statements of account for the four C projects as and when they fell due. The court agreed with the defendant that the plaintiff's submission that the time began to run only from the time the plaintiff knew of his right to sue goes against the tenor and grain of the law and limitation and the plaintiff's claim was time-barred.

D **[55]** In the present case, when the award which included the costs was registered, there was no question of time bar.

[56] In *Rizana Mohamad Daud v. Naluri Corporation Bhd* [2013] 1 CLJ 291; [2012] 4 AMR 167, the plaintiff had sued the defendant on 6 April 2011 for compensation payable upon cessation of her employment from the E defendant. The defendant disputed the plaintiff's entitlement to compensation and alleged that the claim was time-barred because time began to run from the date of resignation (14 January 2005) and expired six years later on 14 January 2011.

[57] It was held that under the plaintiff's contract of employment, F employment may be terminated by either party by giving three months' notice. Time began to run from date of cessation of the plaintiff's employment ie three months after she tendered her resignation (ie after 14 April 2005). The plaintiff's claim was therefore not time-barred.

G **[58]** In *PCM Global Enterprise Sdn Bhd v. Vistaner (M) Sdn Bhd* [2011] 1 LNS 1076; [2011] AMEJ 0356, the defendant appointed the plaintiff as it sub-contractor for two projects. Under each subcontract, the defendant agreed to contra contract sums with transfer of a property. The defendant admitted the contract sums due but refused to transfer the property. The plaintiff then claimed against the defendant for specific performances of the two contracts H ie transfer of the property. The defendant denied the plaintiff's claim for recovery of property by raising defence of limitation. The defendant alleged that the applicable limitation period was six years as the action was founded on contract.

I

[59] It was held that as the plaintiff's remedy was to recover property, the limitation period was 12 years and time began to run from the date the defendant admitted the contract sums. Therefore the plaintiff's claim was not time-barred.

[60] None of the cases relied upon by the respondents tend to show that the final award cannot be registered as a judgment prior to the taxation of the costs. On the other hand, we have the statement of the learned author, Sundra Rajoo, based on the cases of *Metropolitan District Railway Co v. Sharpe, Holdsworth v. Wilson and Lewis v. Rossiter* that even though costs awarded by an arbitral tribunal have not been taxed or agreed upon, they are to be included in the application for recognition/enforcement under s. 38 of the Act.

[61] In the premises, I have dismissed the application of the respondents with costs of RM3,000 subject to allocator.